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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 534

IN THE MATTER OF V-I-D, INC.,
Debtor.

MARGUERITE S. GLOVER,
Petitioner,

vs.

McM. COFFING, TRUSTEE,
V-I-D, INC., DEBTOR,

LAWRENCE H. PRYBYLSKI,
INDENTURE TRUSTEE,

CHARLES J. KRAMER, INTERVENOR,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

May it Please the Court:

The question arose in the District Court, and was disposed of there and on appeal, in the manner following:

The Corporate Debtor (Respondent V-I-D, Inc.) filed a verified petition for reorganization, under and pursuant to the provisions of Chapter X of the Acts of Congress of the United States relating to Bankruptcy, on the 24th day of June, 1939 (R. 1-6) and claimed therein, as an asset of the Debtor estate, the real estate therein described (R. 1, Par. 4).

Thereafter, and on the 28th day of August, 1939, the Judge being satisfied that the petition complied with Chapter X of the Bankruptcy Act, and had been filed in good faith, entered an order approving the said petition as properly filed under Chapter X of the Bankruptcy Act (R. 6).

On December 1, 1939, Marguerite S. Glover (Petitioner here) filed her intervening petition in said proceedings, claiming to be the owner of the said real estate scheduled as an asset by the Debtor corporation and praying that she be adjudged the entire fee simple owner thereof and for possession (R. 12-15) to which McM. Coffing, as Trustee of the debtor estate filed answer on December 21, 1939 (R. 15-17); Lawrence H. Prybylski, Indenture Trustee filed answer on February 13, 1940 (R. 17-19); and said McM. Coffing as Trustee filed an amended and supplemental answer on April 10, 1941 (R. 19-25), and on October 27, 1944, a second amended and supplemental answer and counterclaim (R. 33-42).

June 2, 1943, Petitioner Glover filed her motion praying that the Court investigate its jurisdiction "over this bankruptcy and over this real estate which is the sole scheduled asset of the bankruptcy * * *" (R. 25-28), to which the Indenture Trustee addressed a motion to strike (R. 29) and the Debtor Corporation likewise filed a motion to strike (R. 30) which latter motion was

granted by the District Court on February 4, 1944, with memorandum opinion (R. 32). From this ruling, Petitioner Glover appealed, which appeal on motion of McM. Coffing, as Trustee, was dismissed on June 14, 1944 (R. 104).

The issues raised by Petitioner Glover's intervening or reclamation petition and the answers of the Trustee and Debtor addressed thereto were decided adversely to Petitioner and the Debtor was adjudged the owner in fee simple of the real estate by the District Court on December 2, 1945 (R. 43-45).

On appeal, the decree of the District Court was affirmed and mandate issued (R. 46), and a petition for rehearing filed January 20, 1947, was denied (R. 46).

Thereafter Petitioner, Glover, applied for Certiorari to the Supreme Court of the United States, which was likewise denied (R. 105).

Subsequently, and on June 25, 1947, Petitioner Glover filed her petition for surrender of the real estate for lack of jurisdiction (R. 47-58) the factual basis of which was substantially the same as that set out in her petition for the Court to investigate its jurisdiction filed on June 2, 1943 (R. 25-28) and denied February 4, 1944 (R. 32).

To the Petitioner's petition for surrender of the real estate for lack of jurisdiction, McM. Coffing as Trustee and the Debtor corporation addressed a motion to strike (R. 59), which motion was, on July 21, 1948, granted by the District Court (R. 63).

From the order of the District Court granting the motion of McM. Coffing, as Trustee, and the Debtor corporation to strike her petition for surrender of the real estate for lack of jurisdiction, an appeal was taken by her (R. 63) and the order of the District court was affirmed by the Circuit Court of Appeals for the Seventh Circuit, with opinion, on the 13th day of October, 1949 (R. 102-106).

II.

Summary Argument.

Point A.

Courts of bankruptcy include the District Court of the United States and such courts are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under the Bankruptcy Act.

11 U. S. C. A. Sec. 1;

11 U. S. C. A. Sec. 11(a)

Point B.

Courts of record having authority over the subject matter are competent to decide their own jurisdiction and exercise it to final judgment. Their records are absolute verities not to be impugned by averment or proof to the contrary.

In re Columbia Real Estate Company (D. C. Ind.) 101 Fed. 965, 969;

Matter of 4136 *Wilcox Bldg. Corp.,* 100 Fed. (2d) 588, 590;

Denver First National Bank v. *Klug,* 186 U. S. 202, 22 S. Ct. 899.

Point C.

The presumption which attaches to all judgments of courts of record, together with a direct finding that upon

consideration had a petition in reorganization complies with Chapter X of the Bankruptcy Act and has been filed in good faith, and an order approving the same as properly filed concludes all collateral inquiry as to whether the corporation is subject to the act. It will be presumed that the Court heard and determined the question.

In re Columbia Real Estate Company (D. C. Ind.) 101 Fed. 965.

Point D.

The United States District Court has jurisdiction of the subject of bankruptcy and where the court has jurisdiction of the subject matter and makes erroneous rulings during the exercise of the court's jurisdiction, its orders and decrees cannot be collaterally attacked. Failure to appeal gives to such order a *res judicata* status.

In re First Nat. Bank of Belle Fourche, 15[illegible] Fed. 64;

Matter of 211 *E. Del. Place Bldg. Corp.* (D. C. Ill.) 14 Fed. Supp. 96;

Matter of Forty-One-Thirty-Six Wilcox Bldg. Corp., 100 Fed. (2) 588, 590.

Point E.

Upon the order approving the petition for reorganization under Chapter X becoming final, such jurisdictional questions as the amenability of the debtor to reorganize, the good faith of the petition, as well as all questions of venue may no longer be raised, directly or collaterally.

11 U. S. C. A. Sec. 549;

Senate Report 1916 on H. R. 8046, 75th Congress, 3rd Session (1938) 27;

In the Matter of Park Beach Bldg. Corp. (C. C. A. 7) 96 Fed. (2) 886;

In the Matter of V. Loewer's Gambrinus Brewery Co., Inc., 141 Fed. (2) 747;

Country Life Apartments v. *Buckly*, 145 Fed. (2) 935, 938;

In the Matter of Louis Joliet Garage Corp. (C. C. A. 7) 100 Fed. (2) 751;

In re Barlum Realty Company, 62 Fed. Supp. 81, 86, affirmed in 154 Fed. (2) 562; 157 Fed. (2) 408;

Duggan v. *Sansberry*, 66 S. Ct. 657.

Point F.

Only the debtor, the indenture trustee, and any creditor or stockholder of the debtor is entitled to be heard on *all* matters arising in a proceeding for reorganization.

11 U. S. C. A. Sec. 606.

Point G.

The allegations of a petition for reorganization may be controverted only by a creditor, the indenture trustee, or if the debtor is insolvent, by any stockholder of the debtor.

Bankruptcy Act. Sec. 137, 11 U. S. C. A. 537.

Point H.

In a reorganization proceedings, one not a creditor but claiming to be the owner of property in possession of the court is a complete stranger as to the proceedings providing for the approval of the petition for reorganization and under the Bankruptcy Act as amended is not a proper party to be allowed to intervene to defend and controvert the Court's jurisdiction.

Matter of 1030 *North Dearborn Bldg. Corp.* (D. C. Ill.) 7 Fed. Supp. 896.

Point I.

Intervention is held to be in recognition of the Court's jurisdiction over the proceedings and one invoking that jurisdiction may not deny it.

Matter of 1030 *North Dearborn Bldg. Corp.*, 7 Fed. Supp. 896;

Adler v. *Seamen*, 266 Fed. 828, 841; certiorari denied, 41 S. Ct. 218;

Mueller v. *Adler*, 292 Fed. 138, 139;

U. S. v. *Calumet Cooperative Canneries*, 49 S. Ct. 423, 424;

In re: *Veach*, 4 Fed. (2) 334;

North American Co. v. *S. F. R. Co.* 288 Fed. 612;

Johnson v. *Manhattan Ry. Co.* 280 U. S. 459; 53 S. Ct. 721;

Commerce Trust Company v. *Woodbury*, 77 Fed. (2) 478; certiorari denied *Woodbury* v. *Commerce Trust Company* 296 U. S. 614; 56 S. Ct. 134;

William Whitaker et al v. *Brictson Mfg. Company* (C. C. A. 7) 48 F. (2d) 485.

Point J.

A second appeal is not allowable to review errors which might have been incorporated in the record of a former appeal.

10 Cyclopedia Fed. Proced. (2nd Ed.) Sec. 5096 pgs. 594-595;

St. Louis & S. F. Ry Co. v. *MacClellan*, 62 F. 116, 118.

Point K.

The conclusiveness of a judgment of a competent tribunal extends to what was actually determined and also to every matter which the parties might have litigated in the case.

Van Camp v. *City of Huntington,* 39 Ind. App. 28; 78 N. E. 1057, 1060 Col. 1.

Point L.

In determining the nature of a corporation where jurisdiction of the Bankruptcy Court is challenged the determining factors are the status of the corporation under the state law.

Woolsey v. *Security Trust Company* (C. C. A. 4) 74 F. (2d) 334.

Point M.

Under the law of the State of Indiana a *de jure* corporation comes into existence when the certificate of incorporation has been issued by the Secretary of State.

Western Machine Works v. *Edwards Machine & Tool Corporation, et al.,* 223 Ind. 655, 660 and 663.

Point N.

A court will refuse to exercise its power of superintending control over an inferior tribunal where the party seeking to invoke such power has not exhausted his remedies in the tribunal sought to be controlled.

Long v. *Charles A. Kaufman Co.,* 127 La. 333, 53 So. 583;

Fireman's Ins. Co. v. *Hova,* 141 La. 347, 75 So. 76.

Point O.

The Supreme Court will not take on certiorari cases fully heard and adjudicated below for the mere purpose of examining the result.

Deputy v. *duPont,* 308 U. S. 488; 60 S. Ct. 363 (dissenting opinion of Mr. Justice Roberts);

Magnum Import Co. v. *Houbigant, Inc.* 262 U. S. 159 43 S. Ct. 531.

ARGUMENT.

Point A.

Courts of bankruptcy include the District Court of the United States and such courts are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under the Bankruptcy Act.

This proceeding was filed in the District Court of the United States for the Northern District of Indiana, Hammond Division (R. 1), which is a "Court of Bankruptcy" as defined by Sec. 1(10) of the Bankruptcy Act, 11 U. S. C. A. Sec. 1(10), and which court, as so defined, is invested within its territorial limits with such jurisdiction at law and in equity as will enable it to exercise original jurisdiction under the Bankruptcy Act. Bankruptcy Act Sec. 2a, 11 U. S. C. A. Sec. 11a.

The jurisdiction of the Court was invoked by the Debtor coroporation on June 24, 1939, on which date it filed, in the office of the Clerk thereof, a voluntary petition for reorganization under Chapter X of the Bankruptcy Act. Bankruptcy Act Sec. 101-276, 11 U. S. C. A. Sec. 501-676.

The petition alleged, among other things, that the debtor

> "is a corporation, duly organized and existing under and by virtue of the laws of the State of Indiana, and has for more than six months last past had its principal place of business in the City of Gary, Lake County, Indiana, and within the territorial jurisdiction of the Court; that it is not insolvent, but is unable to pay its debts as they mature" (R. 1).

It is elementary that by jurisdiction of the subject matter is meant jurisdiction of the class of cases to which the particular case belongs. In this case, corporate reorganization under the Bankruptcy Act.

Point B.

Courts of record, having authority of the subject matter, are competent to decide their own jurisdiction and exercise it to final judgment. Their records are absolute verities not to be impugned by averment or proof to the contrary.

Petitioner Glover, being neither a creditor of nor a stockholder in the Debtor Corporation, nor an indenture trustee, but one claiming ownership of property in possession of the Court through its Trustee (R. 12) and therefore, as will hereinafter be shown, a complete stranger to the proceedings providing for the approval of the petition for reorganization, did, subsequently to the date of the entry of the order approving Debtor's petition or being properly filed under Chapter X of the Bankruptcy Act, did file her intervening (actually a reclamation) petition wherein no mention of any objection to jurisdiction was made (R. 12). Not until June 2, 1943, was the petition filed requesting the court to investigate its jurisdiction.

As has been stated by this Court through Mr. Justice Brandeis in *First National Bank* v. *Klug,* 22 S. Ct. 899, at page 900, 186 U. S. 202,

> "The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject matter could not be questioned."

Further, in *In re Columbia Real Estate Company* (D. C. Ind.) 101 Fed. 965, at page 969, where one claiming to

be a creditor of a bankrupt but who in fact was not, sought to vacate and annul an adjudication in bankruptcy, the court said:

> "The presumption which attached to all judgments of courts of record, as well as the direct finding that, upon due consideration had, the Columbia Real Estate Company is adjudged a bankrupt 'within the true intent and meaning of the acts of Congress relating to bankruptcy,' concludes all collateral inquiry as to whether or not the corporation was of a class subject to be adjudicated a bankrupt. It will be presumed that the court had heard and determined that question, and it was not necessary to set out upon the face of the record the facts or the evidence upon which its conclusion was reached. 'Courts of record, having authority over the subject matter, are competent to decide upon their own jurisdiction, and to exercise it to final judgment, without setting forth upon their records the facts and evidence upon which their decision is based. Their records are absolute verities, not to be impugned by averment or proof to the contrary.' 'Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged.' * * * In the present case neither the bankrupt nor any creditor is objecting to the adjudication. Their acquiescence shows that they are content."

Not only does the presumption flow from the entry of the order approving the petition for reorganization that the court considered and determined whether the Debtor was one entitled to the benefits of Chapter X, but also from the rulings of the Court on petitioner's motion to investigate its jurisdiction entered February 4, 1944 (R. 32) and on her motion to surrender property for lack of jurisdiction entered July 21, 1948 (R. 63).

Again this court stated in *Texas & P. R. Co.* v. *Gulf C. & S. F. R. Co.*, 270 U. S. 266, at page 274:

> "In the case at bar, the district court, having jurisdiction generally of the parties and of the subject matter, was called upon to determine whether an allegation in the bill, essential to the cause of action, was established. This, the court clearly had power to do. Moreover, even if the question presented were, as contended, properly one of jurisdiction, the objection urged could not prevail. Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist."

It is significant here, that neither the Debtor corporation, nor any creditor of or stockholder therein, nor the indenture trustee, has at any time made any objection to the proceedings or the jurisdiction of the court thereover. Indeed the Debtor and Indenture Trustee have continuously resisted, since December 1, 1939, and are still resisting Petitioner's claim of ownership of the real estate and her attacks upon the jurisdiction of the Court.

Petitioner's only complaint seems to be that she is dissatisfied with the manner in which the District Court, first through Judge Slick having once and second Judge Swygert, twice, determined that the Court has jurisdiction, and the apparent respect and weight given to those determinations by the Circuit Court of Appeals.

Point C.

The presumption which attaches to all judgments of courts of record, together with a direct finding that upon consideration had a petition in reorganization complies with Chapter X of the Bankruptcy Act and has been filed in good faith, and an order approving the same as properly filed concludes all collateral inquiry as to whether the corporation is subject to the act. It will be presumed that the Court heard and determined the question.

The argument in support of Point B of this argument is applicable in support of this point, and, we feel, requires no elaboration.

Point D.

The United States District Court has jurisdiction of the subject of bankruptcy and where the court has jurisdiction of the subject matter and makes erroneous rulings during the exercise of the court's jurisdiction, its orders and decrees cannot be collaterally attacked. Failure to appeal gives to such order a *res judicata* status.

Not only was no appeal taken by Petitioner from the order taking jurisdiction, but under no circumstances, as will be hereinafter shown, could the Petitioner, a complete stranger as to the proceedings providing for the approval of the petition for reorganization have taken such an appeal, that right being conferred by statute upon the parties thereby authorized.

It has been repeatedly held by the Courts that in the absence of such appeal, it is beyond the power of the Circuit Court of Appeals to review the order taking jurisdiction. We quote from some of such holdings as follows:

> "It was well said by this Court in 1938, that:
>
> 'Furthermore, there having been no appeal from the order taking jurisdiction, and the proceedings having been prosecuted to a completion of the reorganization, it is beyond the power of this Court to review the order even though it were erroneous.' *In the Matter of Park Beach Hotel Bldg. Corp.* (C. C. A. 7th), 96 Fed. (2) 886; 37 A. B. R. (N. S.) 22, 32.
>
> Again, the Circuit Court of Appeals for the Second Circuit has stated:

'The Court found that the petition was filed in good faith and there was no appeal from its order to that effect. Under Section 149 of the Act (11 U. S. C. A. Sec. 549) such an order cannot be attacked for lack of jurisdiction.' And to the same effect *In the matter of V. Loewer's Gambrinus Brewery Co., Inc.*, 141 Fed. (2) 747, 55 A. B. R. (N.S.) 282, 287, and again in *Country Life Apartments* v. *Buckley*, 145 Fed. (2) 935, 938; 57 A. B. R. (N.S.) 651, 658.

Further, where an attempt was made to question the good faith of a reorganization proceedings, after the order approving said petition became final, the Circuit Court of Appeals, speaking through Major, Circuit Judge, said:

'We see no occasion for our discussing or deciding the propriety of such action, however, in the instant case as the question is not properly before us. The proceeding in this respect is not subject to collateral attack.' *In the Matter of Louis Joliet Garage Corp.* (C.C.A. 7th) 100 Fed. (2) 751, 38 A. B. R. (N.S.) 728, 732.

Also the District Court of Michigan, Eastern Division, through Moinett, District Judge, stated:

'The order of December 14, 1943, found that the petition had been filed in good faith, from which no appeal was ever taken. Good faith cannot, at this late date be collaterally attacked, thus when the order approving the petition has become final, it is a conclusive determination of the jurisdiction of the Court.' *In re: Barlum Realty Company*, 62 Fed. Supp. 81, 86, Affirmed in 154 Fed. (2) 562; 157 Fed. (2) 408.

As the Supreme Court stated in *Duggan* v. *Sansberry*, 327 U. S. 506, 508, 90 Law Ed. 809, 815:

'Inasmuch as the interested parties thus had an opportunity in the reorganization proceeding to dispute the allegation of National's petition that a parent subsidiary relationship existed between it and

Christopher and by doing so, to have that issue determined on the facts, we think it plain that Congress intended that the same issue should not be tried collaterally in the bankruptcy proceeding.' "

Point E.

Upon the order approving the petition becoming final, such jurisdictional questions as to the amenability of the debtor to reorganize, the good faith of the petition, as well as all questions of venue may no longer be raised, either directly or collaterally.

In ordinary bankruptcy, the issue of a jurisdictional defect may ordinarily be raised by a proper direct attack in the bankruptcy court at any stage of the proceedings, but in corporate reorganization under Chapter X by reason of Section 149 of the Act 11 U. S. C. A. 549, an order which becomes final approving a petition filed under the Chapter is conclusive as to jurisdiction. This provision is designed to foreclose all direct or collateral attack upon jurisdiction or venue, once the period for appeal from the order of approval has expired. The draftsmen of Chapter X went further and also eliminated the possibility that after the reorganization proceedings are well under way everything might be rendered nugatory by a direct attack based on some newly discovered jurisdictional defect. See Senate Report 1916 on H. R. 8046, 75th Cong. 3rd Sess. (1938) 27.

A case in which the holding, it seems to us, violates the foregoing principle, *in re: National Aircraft Corporation* (*Duggan* v. *Sansberry,* C. C. A. 7th) 149 Fed. (2) 548, was reversed by the Supreme Court (*Duggan* v. *Sansberry*) *in re: National Aircraft Corporation*) 66 Supreme Court 657; 90 Law Ed. 809.

Congress may constitutionally provide for the litigation of certain matters in a specific court, *Yakus* v. *United States* (1944) 64 Sup. St. 660; 88 Law Ed. 834, and we believe it has done so in Chapter X by making the reorganization court where the petition is filed the arbiter as to questions of its jurisdiction and related matters arising in the reorganization proceeding. This view finds support in the statement of Judge Briggle as follows:

> "Section 111 of the Act provides for exclusive jurisdiction; Section 113 clothes the reorganization court with power to stay all proceedings concerning debtor; Section 148 makes the order approving the petition an automatic stay of other proceedings, including a pending bankruptcy, and Section 149 provides that when such order shall become final, it shall constitute a conclusive determination of jurisdiction."
>
> *In Re: National Aircraft Corporation, supra.*

We believe that the decisions of the Courts, including this Court, some of which have been set forth under Point E of this brief, are uniform in holding that approval of the petition is conclusive as to the jurisdiction of the Court and particularly is this true where an attack upon the jurisdiction is attempted by a stranger to the proceedings.

Points F and G.

Further the allegations of a petition for reorganization may be controverted only by a creditor, the indenture trustee, or if the debtor is insolvent, by any stockholder of the debtor.

Only the debtor, the indenture trustee, and any creditor or stockholder of the debtor is entitled to be heard on *all* matters arising in a proceeding for reorganization.

The Congress has fixed the rights of parties in connection with a reorganization proceedings by providing that the allegations of a petition for reorganization may be controverted only by a creditor or indenture trustee, or if the debtor is not insolvent, by any stockholder of the debtor, Bankruptcy Act Sec. 137; 11 U. S. C. A. Sec. 537, and further that as of right, only the debtor, the indenture trustees and any creditor or stockholder of the Debtor may be heard on all matters *arising* in a proceedings under the Statute, a permissive right only being given to certain other parties. Bankruptcy Act, Sec. 206, 11 U. S. C. A. Sec. 606.

It is important to note that there is a distinction as to the rights granted, one, to certain defined parties to controvert the petition which is of course inclusive of controverting jurisdiction and the other rights granted to be heard on all matters *arising* in a proceeding. It is evident, we think, that the right growing out of an intervention with permission of the Court, is merely the right to be heard on all matters *arising in the proceedings,* which presupposes the existence of jurisdiction and is not inclusive of the right specifically granted under Section 137, 11 U. S. C. A. Sec. 537, to controvert the allegations of the petition, including jurisdictional allegations. As will be shown under Point H of this brief, this reasoning is approved.

Here, Petitioner falls within the class whose rights extend only to a right to be heard on matters arising in the proceeding which includes the right to have her claim determined by the Court. The Court determined December 3, 1945, that she has no right, title or interest in the real estate involved (R. 105) and adjudging the Debtor to be the fee simple owner thereof. There her rights ended.

Point H.

In a reorganization proceedings, one not a creditor but claiming to be the owner of property in possession of the court is a complete stranger as to the proceedings providing for the approval of the petition for reorganization and under the Bankruptcy Act as amended is not a proper party to be allowed to intervene to defend and controvert the Court's jurisdiction.

As has been pointed out in argument under Point B, the intervention of Petitioner in the proceedings was upon the basis of her claiming ownership of property claimed and scheduled by the Debtor as an asset. Only after the filing of answers on the merits to the intervening or reclamation petition (R. 15, 17, 19) did the Petitioner attack the jurisdiction of the Court (R. 25). Had the petitioner attempted to intervene for the purpose of attacking the jurisdiction, rather than for the purpose above mentioned, and then after no objection and the filing of answers, and then making her attack, both the respondents and the District Court would have been afforded the opportunity of preventing the intervention.

The fact, is, one who is neither a creditor or stockholder of the Debtor nor an indenture trustee, may not intervene to controvert the allegations of the petition for reorganization.

In a well reasoned case under former Sec. 77(b) of the Bankruptcy Act, the District Court of Illinois, *in Matter of* 1030 *North Dearborn Bldg. Corp.*, 7 Fed. Supp. 896, wherein the M. Stein Hotel Company claimed ownership of real estate claimed by the Debtor Corporation sought to file an answer seeking to defeat the original proceedings and secure a dismissal thereof, the Court in denying the right to intervene said:

"Section 77B, subsection (a) of the Bankruptcy Act as amended provides for the filing of a petition such as filed here by three or more creditors. The same subsection provides that three or more creditors holding claims of $1,000 or more in value in excess of securities held or stockholders aggregating 5 per cent of the total shares of capital stock shall have the right to appear and controvert the facts alleged in the petition, whereupon the court shall hear and determine the issues. There is no other provision for any other person appearing in defense of the petition.

Subsection (c) of Section 77B has to do with proceedings after the preliminary hearings upon the validity of the petition, including the appointment of the trustee and all other proceedings in court thereafter. In this subsection it is provided that any stockholder shall have the right, upon filing a petition to intervene, to be heard upon questions arising in the proceeding, as the court shall determine. It thus appears that so far as the preliminary hearing is concerned, and so far as the relief which may then be granted is concerned, the M. Stein Hotel Company is a complete stranger. It is not a creditor but claims to be the owner of the property. Consequently under the provision of the Bankruptcy as amended, it is not a proper party to be allowed to intervene to defend and controvert the propriety of the filing of the original petition, or the court's jurisdiction thereunder."

The rule that a stranger to a proceeding is indeed a salutary one. Any other would result only in an unjustified burden on the Courts in determining jurisdictional questions at the behest of parties having no interest in the litigation.

Point I.

Intervention is held to be in recognition of the Court's jurisdiction over the proceedings and one invoking that jurisdiction may not deny it.

There is a further insurmountable hurdle in the way of the Petitioner prevailing in the rule uniformly sustained by the decisions that one may not invoke the jurisdiction of a Court and having come in, challenge the propriety of the main action.

The Courts have uniformly held that under this rule the intervener cannot challenge the propriety of the main litigation but must accept it. *Adler* v. *Seamen*, 266 Fed. 828, 841; that an intervener cannot attack the jurisdiction of the Court; *Mueller* v. *Adler, supra;* and that an intervention will not be allowed for the purpose of impeaching a decree already made. *United States* v. *Calumet Co-operative Canneries*, 49 Sup. Ct. 423, 424; 73 Law Ed. 838, 841. Quite obviously then, if one may not be permitted to intervene for the purpose of attacking the jurisdiction of the Court, much less may he intervene for a specific purpose, and intervention having been granted for that purpose, then as intervener attack the jurisdiction of the Court.

This Court, speaking through Lindley, District Judge, *In the matter of Park Beach Hotel Bldg. Corp.* (C. C. A. 7th) 96 Fed. (2) 886; 37 A. B. R. (NS) 22, 32, states:

> "A complete answer to the receiver's assertion of lack of jurisdiction is found in his own acquiescence therein. Recognizing paramount jurisdiction in the bankruptcy court he surrendered the premises without controversy. He even invoked exercise of jurisdiction by asking in his petition for additional compensation and for approval of his accounts as receiver. He could not play both hot and cold with

this question. He could not in one breath invoke the beneficence of the jurisdiction and in the other deny *in toto* its existence." Citing *Troell* v. *Del. L. & W. R. Co.*, 33 Sup. Ct. 74, 57 Law Ed. 586; *Coburn* v. *Cedar Valley Land and Title Company*, 11 Sup. Ct. 258; 34 Law Ed. 876; *Nauvoo* v. *Ritter*, 97 U. S. 389, 24 Law Ed. 1050 (Emphasis ours).

Again *In Matter of* 1030 *North Dearborn Bldg. Corp.* (D. C. Ill.) 7 Fed. Supp. 896, the Court carefully considered the question and stated:

"The qualification, that the intervention shall be in subordination to and in recognition of the proceeding is in accord with the practice as it had been previously established in federal courts. Thus in *Central Trust Co.* v. *McGeorge*, 151 U. S. 129, 14 S. Ct. 286, 38 L. Ed. 98, the court said:

'It is scarcely necessary to say that, as the defendant company had submitted itself to the jurisdiction of the court, such voluntary action could not be overruled at the instance of stockholders and creditors, not parties to the suit as brought, but who were permitted to become such by an intervening petition.'

This has been followed in numerous cases. *Citizens Bank & Trust Co.* v. *Union Mining & Gold Co.*, 106 F. 97; *Horn* v. *Pere Marquette R. Co. et al.*, 151 F. 626 (opinion Judge Lurton, Justice of Supreme Court); *Grand Trunk Ry. Co.* v. *Central Vermont R. Co.*, 85 F. 87. In *Cauffiel* v. *Lawrence*, 256 F. 714, Judge Sanford, afterwards Justice of the Supreme Court, announced that intervention could not be permitted for the purpose of contesting claimant's ownership of the cause of action mentioned in the bill. In *Hopkins* v. *Lancaster*, 254 F. 190, the court approved the doctrine announced by the Supreme Court of Alabama in *Curtis* v. *Curtis*, 180 Ala. 64, 60 So. 167, as follows:

'Our own court has recognized the right of intervention, but held that a stranger could not intervene

for the purpose of defeating the entire suit, nor for the purpose of litigating with the complainant his right or title to any relief; also that, if it is desired to set up a new and independent claim, it must be done by an original bill in the nature of a crossbill. *Renfro Bro.* v. *Goetter, Weil & Co.*, 78 Ala. 311, 313-315' *Ex parte* Gray, 157 Ala. 358, 47 So. 286, 288, 131 Am. St. Rep. 62.

On the other hand it is in accord with well recognized equity practice that any party in interest, that is any party having a valuable interest in the subject matter of litigation, may, in subordination to and in recognition of the original proceeding, be allowed to intervene for the protection of such interest. Examples of such approved intervention are *Rhinehart* v. *Victor Talking Mach. Co.*, 261 F. 646; *Fidelity Trust & Safety Vault Co.* v. *Mobile St. Ry. Co.*, 53 F. 850; * * *.

Accordingly, giving consideration to the provisions of the Bankruptcy Act aforesaid, and applying the rules governing equity procedure, which, in the absence of statutory directions, control in bankruptcy, I am of the opinion that the applicants for intervention may not properly be admitted for the purpose of contesting the jurisdiction of the court or for the purpose of defeating the petition, but that they may be admitted upon proper petitions for intervention in subordination to and in recognition of the original proceeding for the purpose of presenting by bill of intervention or other appropriate pleadings their respective rights and interests in any property involved in this litigation.

Accordingly the respective applicants for leave to file answer for the purpose of defeating the original petition will be denied and exception allowed.

This memorandum, however, is not an approval of the petition. It is the court's duty to determine whether or not the same has been filed in good faith and no evidence has as yet been submitted upon that question."

Point J.

A second appeal is not allowable to review errors which might have been incorporated in the record of a former appeal.

The identical question involved in this appeal was raised by petitioner appellant on June 2, 1943 (R. 25) by a petition praying that the court investigate its jurisdiction which was stricken out on motion (R. 32).

Thereafter, on appeal to this court, from an adverse judgment entered against petitioner appellant on her intervening or reclamation petition, *In Re: V-I-D, INC.*, and in which no question as to the jurisdiction of the Court was raised, said judgment was affirmed, 158 F. (2d) 963.

A second appeal is not allowable to review errors which might have been incorporated in a record of a former appeal, 10 Cyc. Fed. Procedure, 2nd Ed. p. 596, section 5096, *St. Louis and S. F. Ry. Co.* v. *MacClellan,* 62 Fed. 116, 118. Assuredly this question might have been incorporated in the record in petitioner appellant's former appeal and the question presented to this court for its decision. Appeals from judgments or court orders after appeal and mandate are not allowable unless some new matter has developed and then only to reach such new matters, 10 Cyc. Fed. Procedure, 2nd Ed. p. 594-595, Section 5096, and the conclusiveness of a judgment of a competent tribunal extends to what was actually determined and also to every matter which the parties might have litigated in the case. *Van Camp* v. *City of Huntington,* 39 Ind. App. 28, 78 N. E. 1057, 1060, Col. 1.

Points K, L and M.

The conclusiveness of a judgment of a competent tribunal extends to what was actually determined and also to every matter which the parties might have litigated in the case.

In determining the nature of a corporation where jurisdiction of the Bankruptcy Court is challenged the determining factors are the status of the corporation under the state law.

Under the law of the State of Indiana a *de jure* corporation comes into existence when the certificate of incorporation has been issued by the Secretary of State.

In determining the nature of a corporation where jurisdiction of the Bankruptcy Court is challenged, the determining factors are the status of the corporation under the state law which licensed it, *Woolsey* v. *Security Trust Company* (C. C. A. 4th) 74 F. (2d) 334, and under the Indiana Law a *de jure* corporation comes into existence when the certificate of incorporation has been issued by the Secretary of State.

It is urged by petitioner appellant that the reorganization of the debtor corporation was defective and that by reason thereof, and for other reasons, urges that an apparent jurisdiction in the Court was created, when, as a matter of fact, the jurisdictional requirements were not present.

In support of such alleged defect, she cites Indiana cases, all of which were decided under the Indiana General Corporation Act of 1921. The corporate debtor here was incorporated long subsequent to the adoption of the Indiana General Corporation Act. of 1929. In 1945, the Supreme Court of the State of Indiana, in a case

wherein it was asserted that by reason of a corporate entity having failed to comply with a provision of the 1929 General Corporation Act of Indiana as set forth in 1933 Burns Indiana Annotated Statutes, Section 25-219, such entity had no power to invoke the jurisdiction of the State court and exercise a remedy provided by the Indiana Law. The Court in passing upon this question stated:

> "In order to decide this cause, it is necessary to determine whether it was the intent of the Legislature in drafting the Domestic Corporation Act to give the appellants the right to make this attack upon the appellee, corporation, for failure to pay in the required amount of capital, or whether the Legislature intended that such failure should merely be grounds for a proceedings to be instituted by the State to dissolve, wind up and terminate said corporation * * *.
>
> It will be noted that said Section 25-218 (Sec. 4918) specifically refers to conditions necessary to be performed in order to constitute a corporation and also conditions precedent to beginning business. Clearly the phrase 'conditions prescribed by this act as precedent to beginning business' is referring to those conditions set out in said Section 25-219 (Sec. 4919). Furthermore, Section 25-219 (Sec. 4919) also provides that the officers and directors who participate in such business or incur such indebtedness shall be personally liable. This would also indicate that the conditions set out in said section are conditions subsequent to the organization of a corporation and are conditions precedent as to doing business only, for if they were conditions necessary to be performed in order to bring the corporation into existence, then their failure to be so performed would cause said officers and directors to be personally liable without any such express provision. *Coleman* v. *Coleman et al.* 1881, 78 Ind. 344. From an examination of the foregoing sections, it is our opinion that by

said Sec. 25-218 (Sec. 4918) a *de jure corporation comes into existence when the certificate of incorporation has been issued by the Secretary of State.* This being true, all citations of authority as to *de facto* corporations, have no bearing on the question before us, nor is there any question of *estoppel* involved in this case as the record discloses that the appellants have not had any dealing whatsoever with the appellee company. The conditions set forth in said Section 25-219 (Sec. 4919) are merely conditions precedent to beginning business and have nothing to do with the organization necessary to be carried out in order to make the appellant company a *de jure* corporation" (Emphasis ours). *Western Machine Works* v. *Edwards Machine & Tool Corporation, et al;* 223 Ind. 655, 660 and 663; 63 N. E. (2) 535.

Point N.

A court will refuse to exercise its power to superintending control over an inferior tribunal where the party seeking to invoke such power has not exhausted his remedies in the tribunal sought to be controlled.

Petitioner asks this court to remove the "contumacious" stigma with which the Court of Appeals unjustly handled her because she raised the jurisdictional question (Petition for Writ, page 2, paragraph numbered (2)).

The record here is silent as to the Petitioner having filed a petition for rehearing before the Court of Appeals, and silent as to any effort being made to have eliminated the portion of the opinion to which she objects, before publication thereof.

It is axiomatic, we think, and requires the citation of no authority, that a court will refuse to exercise its power of superintending control over an inferior tribunal,

where the party seeking relief has given no opportunity to the court sought to be controlled to afford a remedy.

Further, as shown in argument, *infra,* under Points F and G, the District Court by its decree entered December 3, 1945, denied in all things the intervening or reclamation petition of petitioner and adjudged the Debtor Corporation to be the owner of said real estate in fee simple. That judgment was affirmed by the Court of Appeals, a petition for rehearing denied and certiorari denied. and mandate issued and was filed in the District Court, May 26, 1947 (R. 104-105).

There all petitioner's right to further relief terminated. She was no longer entitled to proceed further as a permissive intervener or in any other capacity.

Thereafter, and on June 25, 1947, denominating herself "intervener," filed her petition for surrender of property for lack of jurisdiction, the factual basis of which is substantially the same as that of the former petition seeking investigation of jurisdiction of the District Court filed June 2, 1943 (R. 105).

On motion of McM. Coffing, Trustee, and of V-I-D, Inc., the debtor corporation, the petition of Glover was stricken, and the third appeal followed, in connection with which Glover seeks certiorari (R. 105).

It is respectfully submitted that action taken by the Petitioner after May 26, 1947, was in defiance of the validity of the main proceeding, could fairly be characterized as contumacious and surely under the facts and circumstances here involving among other things continuous litigation for over ten years over what was held to be a baseless claim in 1947, public policy requires that there be an end to it.

Point O.

The Supreme Court will not take on certiorari cases fully heard and adjudicated below for the mere purpose of examining the result.

Petitioner in her brief fails to set forth any reasons for the granting of the writ sought other than a dissatisfaction with the manner in which the District Court and Circuit Court of Appeals determined the question below, and complaint as to certain language used in the opinion by the Circuit Court of Appeals. In view of her being a stranger to the proceedings providing for the approval of the petition and a stranger to the entire proceeding after she was adjudged to have no interest in the real estate, we cannot believe that she seriously relies upon the grounds for certiorari set forth in Supreme Court Rule 38(b) and there is no other ground.

This Court will exercise its power of certiorari sparingly and with caution and issue its writ only in matters of great public interest. Its position was well stated by Mr. Chief Justice Taft in *Magnum Import Company* v. *Houbigant, Inc.* 262 U. S. 159; 67 Law Ed. 922, 43 Sup. Ct. 531:

> "The question how the Court should exercise this power (to issue writ of certiorari) next arises. The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

And further as said by Mr. Justice Roberts in *Deputy* v. *duPont* 308 U. S. 488, 84 L. Ed. 416, 60 S. Ct. 363,

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower Federal Courts was not intended to be exercised in every case where these courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the Federal Courts. * * * we will not take cases fully heard and adjudicated below for the mere purpose of reexamining the correctness of the result."

Conclusion.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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